Petition

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NO. 81-1969

IN THE

Supreme Court of the United States

October Term, 1981

FRANK WASHINGTON, ALVIN HINKLE, GLORIA JAMES, ROSA BELL JONES, and WALTER STORRS,
Petitioners,

vs.

KIRKMAN FINLAY, JR., individually and as Mayor of the City of Columbia, South Carolina; WILLIAM C. OUZTS, PAUL Z. BENNETT, RUDOLPH C. BARNES, JR., and T. PATTON ADAMS, individually and as members of the City Council of Columbia, South Carolina; MRS. JOHN T. (MARCÍA) DUFFY, individually and as chairman of the Municipal Election Commission of the City of Columbia, South Carolina; and WILHELMINA J. HALLMAN and JOHN C. B. SMITH, JR., individually and as members of the Municipal Election Commission of the City of Columbia, South Carolina,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion and judgment of the Court of Appeals finding constitutional a municipal ordinance providing for the election at-large of the mayor and council of the City of Columbia, South Carolina should be vacated for mootness and remanded for such further proceedings as may be appropriate because of the subsequent repeal of the challenged ordinance and enactment of a new method of municipal elections?

*2. Whether at-large elections under the challenged ordinance dilute minority voting strength in violation of the Fourteenth and Fifteenth Amendments?

*3. Whether at-large elections under the challenged ordinance have a discriminatory effect in violation of §2 of the Voting Rights Act of 1965?

*4. Whether this case should be remanded for further consideration in light

of the intervening decision in City of Mobile v. Bolden, 446 U.S. 55 (1980)?

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*Petitioners, for the reasons infra, believe questions 2, 3 and 4 will become moot. They are preserved, but not argued, in this petition in the unforeseeable event that the underlying change in the method of electing Columbia's municipal government is denied pre-clearance by the Attorney General.

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STATUTORY PROVISIONS INVOLVED

Ordinance 75-30 City of Columbia, South Carolina:

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Columbia, South Carolina, this 17 day of September, 1975, that the Council-Manager form of Municipal government with a Mayor and four Councilmen all elected at large for four year terms staggered to coincide with the expiration of present terms, as provided in Sections 47-80 through 47-89 of the Code of Laws of South Carolina is hereby adopted for the City of Columbia to be effective February 1, 1976, or as soon thereafter as permitted by state law.

Ordinance 75-30 was repealed on December 15, 1981, by favorable referendum on the following question:

Shall the City of Columbia, South Carolina, change the number of and method of election of members of City Council from a Mayor and four Council members, elected at large, to a Mayor and two Council members, elected at large, and four Council members elected one from each of four separate districts; beginning with the 1982 City Council elections, two Council members and the Mayor elected at large, the Mayor and one Council member elected for four-year terms and one Council member elected

to a two-year term, with the Council candidate receiving the highest vote total serving the four-year term; also in the 1982 elections, two Council members elected from single member districts, those districts to be determined by City Council, one Council member for a two-year term and one for a four-year term as determined by Council; in the 1984 election, Council members shall be elected from the remaining two districts, one council member elected for a two-year term and one Council member elected for a four-year term as determined by Council, so that every two years, hereafter, one Council member at large and two from single member districts will be elected for four-year terms.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 664 F.2d 913, and is appended hereto at 1a.

The opinion of the United States District Court for the District of South Carolina is unreported and is appended hereto at 59a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on November 17, 1981. A timely petition for rehearing en banc was denied on December 23, 1981. By order entered March 18, 1982, the Chief Justice of the United States extended the time in which to file this petition to and including April 22, 1982.

This Court has jurisdiction to review the opinion below pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners are black electors of Columbia, South Carolina, who contended that Municipal Ordinance 75-30, providing for the election of the Mayor and four-member City Council at-large,[1] diluted

1. Pursuant to statewide "home
(Footnote continued on next page)

their voting strength in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and 42 U.S.C. §§1971 and 1973.

The district court, after trial on the merits, dismissed the complaint on March 24, 1980, on the grounds that Petitioners "failed to prove any racially discriminatory intent or purpose on the part of the Defendants in maintaining a City Council with four councilmen elected at large." 86a.[1] Petitioners appealed.

(Footnote continued from preceding page)
rule" legislation enacted in 1975, S.C. Code §5-15-20, each municipality was required to provide by ordinance for the election of its mayor at-large and its city council by one of five methods: at-large; single-member districts; a combination of at-large and single member districts; at-large with residency districts; or, a combination of at-large and at-large with residency districts. The City of Columbia adopted the all at-large method on September 17, 1975 which had been in use in the city since 1910.

1. The evidence showed, inter alia, that Columbia has a long history of de jure and de facto racial discrimination which has extended to all areas of life, and that no black has ever been elected to municipal office under the at-large system. 67, 76a.

While the appeal was pending, on October 14, 1981, Respondents adopted a resolution setting a referendum to be held on December 15, 1981 to determine whether the method of electing, and the size of, the Mayor and Council would be changed to provide for the election of the Mayor and two council members at-large and four council members from single-member districts.[1] The resolution was submitted to the Attorney General on October 19, 1981 and pre-cleared under §5 of the Voting Rights Act of 1965.[2]

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1. S.C. Code §5-15-30 provides that a majority of a city council, or 15% of its registered voters, may call a special election to change the number or method of election of council members. A change receiving a majority of the votes cast "shall be effective at the next general election of the municipality." Ibid.

2. The no objection letter was issued by the Attorney General on December 11, 1981.

On November 17, 1981, the Court of Appeals affirmed so much of the district court's opinion which held that Petitioners' "claim fails for lack of proof of discriminatory purpose," 50a, refused to remand for further consideration in light of the intervening decision in City of Mobile v. Bolden, 446 U.S. 55 (1980),[1] but reversed the district court's certification of the action as a class action.[2] A petition for rehearing en banc was denied on December 23, 1981.

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1. The court of appeals held that Petitioners were "charged with the perception" that purpose was an essential element of a dilution claim pre-City of Mobile, 41a, and that proffered evidence that at-large voting was adopted in Columbia in 1910 in part for the specific purpose of excluding blacks from equal political participation was "of limited help" in resolving the constitutional issues. 44a.

2. The district court had ruled pre-trial that the case would not proceed as a class action, a ruling which the court sua sponte reversed after trial. The court of appeals held that Petitioners, who did not appeal the order, "were entitled to rely upon the district court's pre-trial ruling that the action would not proceed as a class action." 57a.

The referendum was duly held on December 15, 1981, and a majority of electors voted to repeal Ordinance 75-30 by adopting the so-called 4-2-1 plan whereby the mayor and two council members would be elected from single-member districts. The referendum was implemented by Ordinance 82-9, February 24, 1982, which restated the referendum question in the affirmative, and set boundaries for the four single-member districts.

The referendum vote and Ordinance 82-9 were submitted to the Attorney General for pre-clearance pursuant to §5 on March 10, 1982.

REASONS FOR GRANTING THE WRIT

Columbia Ordinance 75-30, challenged by Petitioners as diluting their voting strength, was repealed by referendum and an entirely new method of electing the mayor

and council implemented in its stead by Ordinance 82-9. Accordingly, the judgment below should be vacated for mootness and the case remanded for such further proceedings as may be appropriate. Allen v. Ellisor, ___U.S.___, 102 S.Ct. 80 (1981); Crowell v. Mader, 444 U.S. 505 (1980); Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 415 (1972); United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950).[1]

Although neither the referendum vote nor Ordinance 82-9 have yet been pre-cleared

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1. Petitioners did not seek similar relief from the court of appeals because the referendum was not held until after the panel decision and submission of the request for en banc consideration.

under §5, there is no question that the underlying change from at-large to a combination of at-large and single-member district voting is unobjectionable under Beer v. United States, 425 U.S. 130 (1976). Petitioners concede that this change is not racially regressive but enhances minority participation in the electorate.[1]

CONCLUSION

This case, which presented substantial issues of the constitutionality of at-large voting under Ordinance 75-30, has been mooted by repeal of the ordinance, and the opportunity of this Court to review these issues has been removed. The Petition for Writ of Certiorari should be granted, the judgment below vacated and the case remanded

1. The issues of whether Ordinance 82-9 is constitutional or whether the district lines were drawn in a way which complies with §5 have never been presented to any court or decided by the Attorney General, and are thus not involved in this petition.

for such further proceedings as may be appropriate.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1277

Frank Washington, Alvin Hinkle, Gloria James, Rosa Bell Jones, Walter Storrs,

Appellants,

versus

Kirkman Finlay, Jr., individually and as Mayor of the City of Columbia, South Carolina; William C. Ouzts, Paul Z. Bennett, Rudolph C. Barnes, Jr., and T. Patton Adams, individually and as members of the City Council of Columbia, South Carolina; Mrs. John T. (Marcia) Duffy, individually and as chairman of the Municipal Election Commission of the City of Columbia, South Carolina; and Wilhelmina J. Hallman and John C.B. Smith, Jr., individually and as members of the Municipal Election Commission of the City of Columbia, South Carolina,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge.

Argued February 4, 1981.
Decided November 17, 1981

Before BRYAN, Senior Circuit Judge, PHILLIPS and SPROUSE, Circuit Judges.

PHILLIPS, Circuit Judge:

This is a vote dilution case in which the plaintiffs, asserting rights under the first, thirteenth, fourteenth and fifteenth amendments and 42 U.S.C. §§ 1971, 1973 and 1983, allege that the purpose and effect of the at-large election system for constituting the City Council in Columbia, South Carolina, is to dilute the voting rights of black citizens. The district court held against the plaintiffs on the merits, expressly determining that the at-large system did not violate the fourteenth or fifteenth amendments, and, without specifically addressing them, also necessarily rejecting the plaintiffs' other constitutional and statutory claims. After the district court's decision, the Supreme Court decided City of Mobile v. Bolden, 446 U.S. 55 (1980). On appeal, the

plaintiffs seek reversal of the court's fourteenth and fifteenth amendment determinations and press their other constitutional and statutory claims. Alternatively, they seek a remand allowing them to present additional evidence of discriminatory purpose in light of Mobile.

We find no reversible error in the district court's ultimate determination that the at-large system violates none of plaintiffs' constitutional or statutory rights. We decline to order a remand for the presentation of further evidence, for in our view City of Mobile v. Bolden, while admittedly not altogether clear in its ultimate implications, did not change the law to the extent requiring reconsideration of the claims on a reopened record. We therefore affirm the district court's dismissal of the plaintiffs' individual claims, but we find reversible error in its certification of the action as a class action at the time of its dismissal of the

individual claims on the merits.

I

Columbia has a council-manager form of government, adopted pursuant to the South Carolina Home Rule Act in 1975. The present plan includes four councilmen and a mayor, elected at large from the City of Columbia. This general form of government has been in existence since 1910, when Columbia adopted a commission form of government to replace a system under which the City was governed by an intendant and wardens or aldermen elected from districts.

Prior to 1975, nominations for the office of mayor and councilmen were made through political parties by use of a primary, convention or petition. In September 1975, the Columbia City Council adopted a non-partison format for election. The present system, in part adopted in 1977, provides that the election process is open to any registered elector who is a

resident of the City. Candidates may campaign on particular party platforms or for a particular party, but there is no indication of party affiliation on the ballot. Any candidate who receives a majority of the votes in the election is elected, while those who receive less than a majority must participate in a run-off between one more than the number of candidates necessary to fill the offices. Those receiving the highest number of votes in the run-off election are elected.

After this suit was filed, the City Council adopted a resolution proposing a change in the election process and in the number of councilmen. The proposal would have increased the number of council members to six, with three elected at large and three from single-member districts, plus the mayor elected at large. This plan was to be adopted if it had been approved by the voters in a referendum. There was no

support either in the white community or the black community for this plan, and it was rejected. Black leaders apparently thought that it did not go far enough.

The 1970 census figures show that Columbia has a population of 113,542, of which 39,998 (35%) are black. In 1978, the date of the last city election, there were 11,464 black registered voters and 22,296 white registered voters. During the 1978 primary election for City Council, 36.8% of the blacks voted and 41.5% of whites voted. Blacks have been running regularly for the City Council for the past ten to twelve years, but no black has been elected to City Council within living memory.

As expressly found by the district court, there has been a long history of de facto and de jure discrimination in Columbia. It has touched all areas of life. Until 1948 blacks were excluded from voting by a variety of methods, including poll taxes,

literacy tests and membership restrictions imposed by the Democratic Party. Schools were racially segregated from the first grade through college, and public accommodations and transportation within the city were operated on a similar basis. Although the court found this kind of overt discrimination no longer existent, it found that in the areas of "income, education, housing and employment blacks in the City of Columbia, on the average, exist at a lower socio-economic level, and there are many residential areas in the City which are racially identifiable."

As also found by the court, however, many of the techniques which had been used in the part to discourage black voters from voting or which have been found to contribute to dilution of black persons' votes have been eliminated. South Carolina no longer has an anti-single shot voting law. This law was found unconstitutional in 1972.

Further, there is no longer a poll tax, literacy test, or any other restriction which could be applied in a discriminatory manner. Both major political parties are open to blacks and actively solicit their membership and support. Registration officials now visit various parts of the cities and counties in order to facilitate registration, no longer requiring voters to come to the courthouse or office of the Registration Board to register. Any registered voter may run for office by paying a small filing fee, which is waived on the filing of an affidavit declaring inability to pay. There is no primary and no requirement for party affiliation.

Voting is racially identifiable because of the racial identity of certain neighborhoods. In recent elections polarization on racial lines has remained significant, but does not approach totality. White and black candidates alike seek support from all areas of the city and

receive support along non-racial lines. A black candidate has not yet been elected to City Council, but in the 1978 city election black candidates received approximately 25% of the vote in predominantly white areas and white candidates received 7% of the vote in predominantly black areas.

In terms of public employment, service on appointive governmental bodies, and receipt of essential and special governmental services, black citizens - while arguably not yet fairly served - are not on the other hand simply ignored by elected city officials. Forty-three percent of the city's work force is black. Blacks serve by appointment on a significant number of city boards and commissions; there are two black city judges, two black city clerks, and several black supervisors and division heads in various departments. Columbia recently has applied over 90% of the Community Development

Block Grant Funds to benefit low to moderate income families, including many blacks, and has employed a Community Development Director to work with HUD in an effort to provide more housing and rental units for low income groups.

Addressing directly only the fourteenth and fifteenth amendment claims, the district court made detailed findings of evidentiary and ultimate fact to which it applied the vote dilution principles set out in White v. Regester, 412 U.S. 755 (1973), as articulated in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). The court concluded that the plaintiffs had failed under White v. Regester's standards to prove a discriminatory effect traceable to the at-large voting system. Further, it concluded that there had been a failure

to prove any racially discriminatory intent or purpose, as required by Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), to establish or maintain the system. Having found no discriminatory effect or purpose in violation of the fourteenth or fifteenth amendment, and by necessary implication having rejected all other claims, the district court dismissed the action, certifying it as a class action in the process.

II

We first address the fourteenth and fifteenth amendment claims; next, the plaintiffs' contention that the case should at least be remanded for re-trial on a reopened record in light of Mobile; then the other constitutional and statutory claims; and, finally, the action of the district court in certifying the action as a class action.

A

The controlling principles for assessing the plaintiffs' fourteenth and fifteenth amendment claims are now to be sought in City of Mobile v. Bolden, 446 U.S. 55 (1980). The parties predictably disagree about the effect of Mobile on the merits of this case and, beyond that, about the proper disposition of this appeal if we conclude that, tested by Mobile, the plaintiffs' claims fail of proof.

Without attempting here a comprehensive exegesis of the controlling plurality and concurring opinions in Mobile[1/] and of the main lines of earlier authority upon which they were based,[2/] we accept as

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[1]For an example, see Lodge v. Buxton, 639 F.2d 1348, 1369-72 (5th Cir. 1981).

[2]Essentially, on the fourteenth amendment claim: Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403

(Footnote continued on next page)

authoritative and controlling for our purposes the following principles drawn directly and by necessary implication from those opinions considered in the aggregate.

Claims of racially discriminatory vote dilution exist under both the fifteenth amendment and the Equal Protection Clause of the fourteenth amendment. They are essentially congruent since, under either, the claim can only be established by proof (a) that vote dilution, as a special form

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(Footnote continued from preceding page) U.S. 124 (1971); on the fifteenth amendment claim: Wright v. Rockefeller, 376 U.S. 52 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

of discriminatory effect,[3] exists and (b) that it results from a racially discriminatory purpose[4] chargeable to the state.

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[3] Though the four members of the Mobile plurality believed that the fifteenth amendment only protects against denials of the right to register and vote, i.e., that this is the only kind of "effect" it prohibits, Mobile, 446 U.S. at 64-65, a majority of the Court apparently disagrees and considers that its prohibition extends as well to the vote dilution effect here in issue. See id. at 94, 102, 126-29 (Brennan, White and Marshall, JJ., dissenting); id. at 80-83 (Blackmun, J., concurring; semble); id. at 83-85 (Stevens, J., concurring).

There being no apparent disagreement within the Mobile Court that the Equal Protection Clause protects against this kind of vote dilution effect, the two claims are congruent on this element in the view of a majority of the Court.

[4] A majority of the Mobile Court was apparently agreed that a discriminatory purpose must be proved to establish either claim. The four members of the plurality clearly so agreed. See Mobile, 446 U.S. at 62, 66. It appears that Justices White and Blackmun concur in that view, though the latter only assumed it for purposes of his special concurrence in the result. See id. at 94-103 (White, J., dissenting); id. at 80 (Blackmun, J., concurring). Justices Brennan and Marshall flatly disagreed,
(Footnote continued on next page)

Id. at 66-70 (plurality opinion).

The first inquiry in assessing proof of a vote dilution claim is whether there is - without regard to motivating purpose - a discriminatory "effect" traceable to the challenged state action. This is the critical threshold issue: are the voting rights of the racial minority, as a matter of fact, impermissibly "diluted"? Vote dilution as a discriminatory effect or condition - whether viewed from the fourteenth amendment or fifteenth amendment perspectives - is not more specifically

(Footnote continued from preceding page) thinking that only a discriminatory effect need be proved under either claim. See id. at 103-05 (Marshall, J., dissenting); id. at 94 (Brennan, J., dissenting). Justice Stevens' singular view on the matter so substantially differs from that expressed in either the plurality or opposed dissenting opinions that it must simply be counted uncertain if a clear choice between those polar positions were required. See id. at 90-94 (Stevens, J., concurring).

defined by the Mobile Court than as a condition in which the "voting potential" of a racial minority has been "minimize[d] or cancel[led] out," id. at 66; or the "political strength" of such a group "adversely affect[ed]," id. at 84 (Stevens, J., concurring); or its "access. . .to the political process" demonstrably "restricted," id. at 69 (plurality opinion).

More precise meaning may, however, be gleaned from earlier decisions specifically approved in Mobile in which dilution claims were assessed in relation to particular facts, and from the Mobile Court's reiteration of the fundamental negative principle that disproportionate representation and consistent "electoral defeat," though traceable to the challenged system, do not alone constitute impermissible dilution, id. at 75 & n.22, 76; id. at 86 (Stevens, J., concurring). Factors other than bare electoral defeat and consequent disproportionate representation that may, in the

aggregate, demonstrate a condition of impermissible dilution are those synthesized from earlier Supreme Court decisions in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976):

> "lack of access to the process of slating candidates, the unresponsiveness of legislators to [the racial minority's] particularized interests, a tenuous state policy underlying the preference for. . . at-large districting, . . .the existence of past discrimination in general preclud[ing] the effective participation in the election system. . . [and such 'enhancing' factors as] large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts."

Id. at 1305 (footnotes omitted).

Proof by such means that a discriminatory effect (or disproportionate impact, or dilution of voting potential) exists does not end the inquiry; it is also necessary to establish "that the disputed plan was

'conceived or operated as [a] purposeful devic[e] to further racial. . .discrimination,' " Mobile, 446 U.S. at 66 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)).

The "Zimmer factors" showing the existence of a disproportionate impact or effect "may provide an important starting point" for proving by inference the requisite intent to cause or perpetuate it. Mobile, 446 U.S. at 70. But, at least where the challenged system's existence "is readily explainable on grounds apart from race. . . , disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." Id. To the extent the Fifth Circuit's opinion in Zimmer v. McKeithen had implied the contrary, it is expressly disapproved in Mobile.

B

Applying these principles to the record before us, we find no reversible error in the district court's rejection on the merits of the congruent fourteenth and fifteenth amendment claims. As indicated, the court addressed both the "effect" and "purpose" elements of these claims and determined that the plaintiffs' proof established neither. Critical to that determination were certain basic and ultimate findings of fact which we review under the clearly erroneous standard, Fed.R.Civ.P. 52(a), given special color here by the Supreme Court's admonition that in vote dilution cases special deference is owed the trial court's superior vantage point in making the required "intensely local appraisal of the design and impact" of a challenged voting system. White v. Regester, 412 U.S. 755, 769 (1973). Applying that standard of review, we conclude that the

court's dispositive fact findings against the plaintiffs on both the "effect" and "purpose" elements are not clearly erroneous and support the legal conclusions that the claims were not established. We take these in turn.

(1)

The "Zimmer criteria" for assessing a racially discriminatory effect simply recognize two essential means by which any identifiable minority group's votes can be effectively diluted. The first and most obvious are formal rules and practices integral to an electoral system that inescapably prevent "effective participation" by the minority in the total process by which elections and referenda are conducted. These range from such direct impediments as poll taxes, literacy requirements, candidate qualifications and the like to more indirect technical forms such as majority voting and anti-single shot provisions,

party primaries, and the like. Obviously these in sufficient combination can operate directly to "submerge" the minority in a racially polarized voting constituency; to "minimize or cancel out its voting potential;" to affect adversely its "political strength." See, e.g., White v. Regester, 412 U.S. 755 (1973).

Even where technical impediments of this kind do not exist in sufficient combination to dilute a minority's voting potential, there may yet exist more subtle impediments traceable to the combined effects of an at-large electoral system interacting with various forces of continuing social and economic disadvantage, also chargeable to the state, that have this effect. Direct evidence of these subtleties is not likely to be available, and the only evidence of their existence and impact may lie in the circumstance that the officials in power are demonstrably "unresponsive" -

in either an absolute or relative sense - to the needs and interests of the minority. Such a lack of responsiveness may raise the fair inference that within the total social, economic and political context in which the electoral system operates, its practical effect has been to cancel out that residual political strength - based upon the continuing threat of reprisal at the polls - that is normally possessed even by currently outnumbered interest groups in the voting constituency. See Nevett v. Sides, 571 F.2d 209, 223 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980).

In its general assessment of the evidence of effect under these Zimmer criteria, the district court recognized that there was some evidence supporting the plaintiffs' claim that dilution by some means had been shown. As the court observed, the black minority in Columbia still experiences the legacy of many years of de

facto and de jure racial segregation, though its more overt forms in public education, transportation and accommodations and, to some extent, in employment, have now been substantially eradicated under compulsion of law. Vestiges remain in many forms of continuing social and economic disadvantage and in racially identifiable residential areas. These indisputable facts the court perforce found, along with the bald fact that within living memory no black person had been elected to the City Council. Within the Zimmer analysis, these facts - either conceded or indisputably shown - demonstrate a history of racial discrimination whose continuing practical effects - aside from any effects traceable directly to the at-large voting system itself - may be assumed still to inhibit to some extent "effective participation in the election system" by the black minority. Zimmer v. McKeithen, 485 F.2d at 1305.

In the Zimmer equation these facts militate in favor of the plaintiffs' claims of a discriminatory effect traceable to the challenged system, and the district court so credited them.[5/] Nevertheless, the court was also entitled to reject as vote dilution per se the at-large feature itself, Mobile, 446 U.S. at 66, as well as

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5 Though the Mobile plurality expressed serious reservations about the relevance and probative force of such "historical and social factors" in proving a vote dilution claim, Mobile, 446 U..S at 75 & n.22 ("gauzy sociological considerations have no constitutional basis"), we assume their continued relevance in view of the Mobile Court's acceptance nevertheless of the continued vitality of White v. Regester, wherein their relevance was assumed and undoubtedly affected the decision. See Mobile, 446 U.S. at 69; see also Lodge v. Buxton, 659 F.2d 1358, 1379, 1381 (5th Cir. 1981).

the ultimate consequences arguably traceable to the at-large system of consistent electoral defeat and consequent disproportionate representation of the black minority in the municipal government of Columbia, id. at 75, 76. Furthermore, the court properly weighed against the claim of discriminatory effect the fact that there no longer exists any of the technical legal impediments to voting of the kind that have weighed heavily in favor of dilution claims in other cases. Though concededly of recent origin and largely the result of direct or indirect legal compulsion, there is at present, under controlling state law, no poll tax, no prohibition against single-shot voting, no literacy test, no impediment to joining political parties or participating in their activities, no primary and no requirement for party affiliation or other barrier to candidacy. Cf. White v. Regester, 412 U.S. 755 (1973); Lodge v. Buxton, 639

1358, 1377-79 (5th Cir. 1981). Neither was there any evidence of practical impediments to voting in the form of veiled coercion chargeable directly or indirectly to the state. Cf. id. 639 F.2d at 1381 ("symbiotic relationship" between private and public sector). Though most assuredly excluded in the past from effective participation in the electoral process by both ruthlessly direct and more indirect forms of state action, blacks do now freely run for city offices and are registered and vote without hindrance in proportions comparable to whites in the city constituency. Recent voting patterns do not reveal even substantially total racial polarization in candidate choice, though preferences on racial lines do obviously exist, as reflected in the 1978 voting analysis earlier mentioned. Based upon these evidentiary facts, the district court found that "[t]he election process for the City Council in

Columbia is the most open and accessible that can be imagined."

Though there may be some element of hyperbole in this finding, its essence - that no state imposed impediments, either legal or practical, to candidacies or to actual voting now exist - is unassailable as an ultimate finding of fact on the record before us.

Turning to the question whether despite this lack of technical impediments to effect participation, there might nevertheless be more subtle forms reflected in a lack of responsiveness on the part of city officials to the black minority's "needs and interests," the court found as an ultimate fact that "[t]he City government has been responsive to the needs of the black community."[6/] Support for this ultimate

[6]The actual issue within the Zimmer analysis was of course whether the city government was "unresponsive," an issue as to which plaintiffs had the burden of proof. (Footnote continued on next page)

finding was found in employment figures showing substantial black employment in city jobs, in significant though concededly not proportional black representation in appointive offices and supervisory positions, in the heavy allocation of federal block grant development funds to the black community, and in the substantially equal provision of essential services and improvements to black residential neighborhoods.

The plaintiffs vigorously challenge the validity of this ultimate finding of fact. Specifically they question the district court's basic finding that blacks had been appointed "to almost all city boards and commissions," and they point to the fact that though overall public employment of blacks was proportionately high -

(Footnote continued from preceding page) Obviously, the court's finding of "responsiveness" constitutes a finding of "not unresponsive" on the issue properly cast.

43% against a general population percentage of 35% - it is concentrated in the most menial, lower paid city jobs. Their own evidence - they say - conclusively shows that, contrary to the court's finding, city officials have been unresponsive to the black minority's needs and interests.

We disagree with plaintiffs' contentions respecting the proof on this issue. Responsiveness in this sense must of necessity be measured only in terms of the effective powers had by the governmental unit involved - here minority employment, minority representation in appointive offices, and the provision of essential governmental services to minority groups and individuals. But cf. Mobile, 446 U.S. at 73 (slight relevance of employment and services data as evidence of purposeful vote dilution). Assessing the evidence in these terms and considering that the burden of proof lay with the plaintiffs to prove

unresponsiveness as an element of their dilution claim and not upon the defendants to prove responsiveness by way of rebuttal or avoidance, cf. Jones v. Pitt County Board of Education, 528 F.2d 414, 417 (4th Cir. 1975), we cannot declare the district court's finding against the plaintiffs on this issue to be clearly erroneous.

In terms of government employment, the city's proof that 43% of city employees were black against their overall population percentage of 35% was countered only by plaintiffs' proof that black employment was largely concentrated in lower paying, more menial jobs. In terms of black representation in appointive positions, the plaintiffs' evidence that no blacks had been appointed to some eighteen boards, commissions and committees of varying degress of importance was countered by the city's proof that 35 blacks did currently serve on 12 such bodies having a total

membership of 157, including one as Chairman of the City Board of Adjustment, and that 2 blacks currently served as city judges, 2 as city clerks, and several as supervisors and heads of divisions in city government. In terms of the provision of essential government services, the city's proof that the overwhelming bulk of federal block grant funds for community development recently available to the city had been applied to benefit members of the black community, and that practically all streets in the city, in both black and white residential neighborhoods, had now been paved, was opposed by evidence that one of the consequences of the city's redevelopment efforts was dislocation of members of the black minority for whose benefit it was ostensibly intended, and by the general

testimony of individual witnesses[7/] that the provision of governmental services in black neighborhoods had lagged behind similar services in white neighborhoods.

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[7]Our characterization of this particular evidence as "general" is done advisedly and to emphasize its probative weakness. Plaintiffs rely, per their references in brief, upon the testimony of two non-expert witnesses to support their contention on this point. We have carefully reviewed that testimony. It consists essentially of impressionistic observations, unsupported by any technical data and preponderately nonspecific as to time and extent, about the provision of essential governmental services - paving, police protection, sewage, housing - to a limited number of black and white neighborhoods in and continguous to Columbia. Without questioning the credibility of these witnesses or the essential accuracy of the general observations elicited from them, the testimony simply lacks probative force because of its nonspecificity and limited nature where specificity and comprehensiveness are both possible and critical to fair fact-finding. Cf., e.g., Lodge v. Buxton, 639 F.2d at 1377 & n.37 (specific evidence of current state of road improvements). Whether or not, as plaintiffs suggest, the district court actually "disregarded" this evidence, we are satisfied that it was properly discounted in assessing whether current unresponsiveness in the provision of services was shown.

On total balance this evidence might be taken - if assessed most favorably to plaintiffs - to establish that the legitimate aspirations of black citizens in Columbia regarding fair public employment by the city and fair representation on its appointive boards and commissions have not yet been fully realized, and that the equal provision of essential governmental services has only been tardily and not yet perfectly achieved.[8/] But even so assessed it cannot be taken to establish a degree of unresponsiveness to the needs and interests of

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[8]The Mobile plurality opinion suggests that while evidence of discrimination in employment and the provision of public services might well support other constitutional and statutory claims, it "is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which [the responsible officials] attained their offices." Mobile, 446 U.S. at 73-74.

the black minority so palpable that it compels - or even fairly supports - an inference that the minority's "voting potential" has been so effectively "cancelled out" that its residual "political strength" is presently being disregarded with confident impunity by the city's governing body. This, we believe, is what is contemplated by the concept of "unresponsiveness" as evidence of, or indeed as the essence of,[9/] vote dilution by means more subtle than the direct or indirect denial of formal access to the ballot or the voting booth. Certainly, assessing the

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[9]The Fifth Circuit has now held that "unresponsiveness" is an essential element of a prima facie case of vote dilution under the fourteenth and fifteenth amendments. Lodge v. Buxton, 639 F.2d at 1375. We are prepared to say and need only say that where no direct denial of voting rights can be shown, there would seem no remaining way to prove that a racially discriminatory effect chargeable to the state nevertheless exists than by this means.

relevant evidence under the clearly erroneous standard, and considering that the burden of proof on the issue lay with plaintiffs, we are not "left with the definite and firm conviction that a mistake has been committed," United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), in the district court's finding on this ultimate issue of fact.

(2)

Even were the district court's finding of no discriminatory effect clearly erroneous, its rejection of the fourteenth and fifteenth amendment claims must still stand, for its further finding that no racially discriminatory purpose had been shown is unassailable under Mobile.

As Mobile has now established, in assessing attempted proof of discriminatory purpose in vote dilution cases where "the character of a law is readily explainable on grounds apart from race. . . , disproportionate impact alone cannot be decisive,

and courts must look to other evidence to support a finding of discriminatory purpose." Mobile, 446 U.S. at 70. Here, the plaintiffs' evidence as to both effect and purpose was essentially confined to establishing a sufficient aggregate of the Zimmer factors, on the apparent perception that by this means alone a discriminatory effect would be directly proven and a discriminatory purpose might rationally be inferred. Even had this evidence sufficed to prove the requisite effect, this would have constituted, under Mobile, merely "an important starting point," id., and not a sufficient means standing alone for proving purpose behind effect.

It is inescapable that here both the initiation and the maintenance of the at-large voting system are readily "explainable on grounds apart from race." The district court found as fact that the at-large system was adopted in 1910 because of

"abuses of the ward system" that it replaced and that "race was not a consideration" because at the time "few, if any, blacks were voting in city elections." These findings are amply supported by contemporaneous documents introduced into evidence by the defendants, and are generally confirmed by the Mobile Court's intervening observation that at-large systems have come to be the norm in municipal government, reflecting a general concensus that they are less subject to corruption than are ward systems. See id. at 60 & n.7, id. at 70 & n.15. Faced therefore with the necessity of producing "other evidence" than the Zimmer factors alone, id. at 70, the plaintiffs' attempt to prove discriminatory purpose simply fails under Mobile - indeed falls far short of that which the Mobile Court found lacking on the record in that case. See id. at

97-99 (White, J., dissenting).[10/]

In assessing the evidence of discriminatory purpose in the instant case, the district court of course did not have Mobile for instruction, but it found as fact, relying upon pre-Mobile authority later relied upon by the Mobile Court,[11/]

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[10]Aside from the failure of plaintiff's proof there is of course defendants-countering evidence that the current city council has recently proposed a revision of the at-large system specifically to insure black representation. While obviously not conclusive upon the issue of its possible racial motivation in "maintaining" the challenged system, it certainly bears heavily upon it.

[11] Specifically, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). The district court also relied upon Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980), in which the Fifth Circuit had held that purposeful discrimination was required under the relevant Supreme Court decisions.

that the at-large system had not been "maintained or operated, at any time since its adoption to promote racially discriminatory purposes." That finding, on the record before the district court, was not clearly erroneous under Mobile.

Though the plaintiffs seek on appeal to avoid this consequence of Mobile's substantive and procedural emphasis on the purpose element,[12/] they contend alternatively, in obvious recognition of the

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12 In addition to challenging directly the district corut's findings and conclusions assuming Mobile applies, the plaintiffs also suggest that it does not apply to this case. The contention is that Mobile applies only to attacks upon an entire form of government and not to an attack, as here, only upon an electoral system. In the latter type situation, it is urged, Mobile's arguably more stringent proof requirements do not apply.

We reject this contention. It is based upon a passing characterization in the Mobile plurality opinion of the action according to the remedy given by the district court, 446 U.S. at 70, and we ascribe to it no such substantive implication as plaintiffs urge. Justice Blackmun, indeed,
(Footnote continued on next page)

difficulty they face, that the emphasis in Mobile was in critical respects so unexpected and unforeseeable that, at the least, a remand should be ordered to allow them to attempt to perfect their proof in Mobile's light. For reasons that follow, we reject that suggestion.

First off, though it is obvious that the Mobile Court was itself sharply divided on the full implications of earlier decisions concerning the purpose element in vote dilution cases, a substantial majority of the Court agreed that those decisions established discriminatory purpose as an essential element in both Equal Protection and fifteenth amendment claims of

(Footnote continued from preceding page) thought the remedy given so much wider than the actual issue presented, that on this basis alone he thought remand required. Id. at 80. The Mobile Court's introductory statement of the issue there presented identifies the claim as one identical to that presented in the instant case: "The question . . .is whether this at-large system of municipal elections violates. . .rights. . . in contravention of federal statutory or constitutional law." Id. at 58. The decision in Mobile clearly controls the decision here.

vote denial or dilution.[13/] Other federal courts have also expressly recognized this at the time the instant action was tried, see, e.g., Nevett v. Sides, 571 F.2d 209, 219-21 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980; and in this very case, as earlier indicated, the district court assumed, on the basis of existing authority and without discussion, that this was established constitutional law. We cannot therefore accept plaintiffs' suggestion that they could not fairly be charged with the perception that discriminatory purpose was an essential element of these claims when they were litigated in district court.

Much less clear is the extent to which pre-Mobile decisions had presaged the limitation on proof of purpose imposed by the Mobile plurality: that where a challenged system is "explainable on grounds other

[13] See note 4 supra.

than race," discriminatory purpose cannot be inferred from discriminatory effect standing alone, but that "other evidence," independent of effect, is required. This question, for example, divided the Mobile majority, including the plurality, that was agreed (or willing to assume) that purpose was an essential substantive element. The plurality - and perhaps only the plurality - believed that the Court was not already committed by those earlier decisions to the proposition that purpose might be inferred solely from proven effect. Other members of the Court flatly disagreed.

Assuming from this division within the Mobile Court that there was sufficient uncertainty on the point to warrant our practical inquiry into the fairness of holding plaintiffs to the deficiencies of proof now revealed, we nevertheless think that remand here is not warranted. Plaintiffs presumably adduced all the evidence available

to them at the time to prove a disproportionate impact under the Zimmer criteria. Certainly they must be held to have had a full and fair opportunity to do so, since obviously they knew that such an impact or effect must be established as an essential element of these claims. They must also be held to have understood that this proof could only have inferential force in establishing purpose, and that if other inferential or direct proof of purpose were available, it too would be highly relevant and perhaps needed to buttress the inference based upon effect alone. While Mobile may have made more explicit the absolute need for other, independent evidence of purpose, we cannot say that the need, or certainly the helpfulness, of such evidence could not have been reasonably apparent to ordinarily prudent counsel in litigating these claims. This, we think, is determinative against the suggestion that fairness requires remand in

light of Mobile. See Lodge v. Buxton, 639 F.2d at 1375-76.

We are buttressed in this position by consideration of the specific basis upon which plaintiffs, in their Reply Brief in this court, say they would be able, and should be allowed, to prove discriminatory purpose upon remand. They suggest, with a proffered forecast, that upon remand they could offer direct proof that the at-large voting system was adopted in 1910 at least in part for the specific purpose of excluding blacks from effective participation in the electoral process.

Reserving the question of the probative force or relevance of the specific evidence which the plaintiffs suggest is available to them on this issue,[14/] there is a fatal flaw in the premise upon which they

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14 Evidence of past acts of official discrimination was said by the Mobile plurality to be "of limited help" in resolving questions of present official motivation. 446 U.S. at 74.

rest the contention that fairness compels remand. They say that this type of direct evidence of purpose was of doubtful admissibility prior to Mobile; that the only clearly admissible evidence at that time was evidence of effect, from which purpose could be inferred. This contention is simply without merit. Neither general principles of procedure or evidence, nor logic, nor anything said in the relevant pre-Mobile decisions of the Supreme Court supports it. At most, as earlier noted, pre-Mobile cases may have suggested that proof of effect could alone suffice to prove purpose; none suggests that only in this way could it be proven.

When, upon trial of the instant case, the City introduced contemporaneous documents tending to show that the essential purpose of adopting the system in 1910 was to root out revealed abuses of the ward system, it clearly lay with the plaintiffs to counter that proof with the kind of

evidence that they suggest should now be considered for the first time. Indeed, not only right but common prudence dictated the effort at that point.

On this basis plaintiffs have failed to demonstrate any basis for the relief they seek through remand.

III

Although plaintiffs' amended complaint clearly retained the allegation that Columbia's at-large election system violated 42 U.S.C.. §§ 1971 and 1973, the district court held that these statutory claims had been abandoned. On appeal, plaintiffs pursue these claims, denying their abandonment, and argue that Congress intended that proof of impact alone is sufficient to show a violation of §§ 1971 and 1973.

Assuming without deciding that the claims were not abandoned during trial and that there is a private right of action under §§ 1971 and 1973, see Mobile, 446 U.S. at 60

& n.8; Brooks v. Nacrelli, 331 F.Supp. 1350, 1352 (E.D.Pa. 1971), aff'd, 473 F.2d 955 (3d Cir. 1973), we conclude that, as a matter of law, plaintiffs may not succeed on either claim, so that remand for their consideration by the district court would be unavailing.

Section 1971(a)(1) provides that "[a]ll citizens of the United States who are otherwise qualified by law to vote. . . shall be entitled and allowed to vote at all . . .elections, without distinction of race, color, or previous condition of servitude. . . ." Plaintiffs cite no authority for the proposition that the prohibitions of § 1971 encompass practices which have only an indirect effect on the worth of a citizen's vote in addition to those which directly affect the ability to cast a vote. We find nothing in the language of § 1971(a) or in the more expansive language of § 1971(e) ("the word 'vote' includes all action necessary to make a vote effective") that support

it. We accordingly conclude that the allegations of voting dilution from the at-large election system in Columbia are not cognizable under 42 U.S.C. § 1971. See United States v. Uvalde Consolidated Independent School District, 461 F.Supp. 117, 119-20 (W.D.Tex. 1978), rev'd on other grounds, 625 F.2d 547 (5th Cir. 1980), cert. denied, ___U.S.___ (1981).

Section 1973 provides that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State. . . to deny or abridge the right. . .to vote on account of race or color." This section concededly appears on its face to be broader than §1971, id. at 120, and plaintiffs argue not only that it encompasses a voting dilution claim such as this one but that the standard intended by Congress is proof only of a diluting effect, not the more stringent one of effect and invidious purpose.

We think this interpretation is precluded by Mobile. Although the plurality opinion in Mobile sought to limit the proscription of the fifteenth amendment and its embodiment in §1973 to direct infringements of the right to vote, 446 U.S. at 60-65, the rest of the Court did not concur in this limitation. See United States v. Uvalde Consolidated Independent School District, 625 F.2d at 551-52. Assuming therefore, without deciding, that vote dilution claims of this type are cognizable under §1973, we proceed on the assumption that a majority of the Supreme Court in Mobile rejected the contention that such a claim can be established by proof alone of a disproportionate impact.[15]

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[15]Admittedly, only the four members of the plurality can be counted firmly in such a supposed majority. See Mobile, 446 U.S. at 60-65. Only two other Justices directly addressed the statutory question. These were dissenting Justices Brennan and Marshall, whose view that the fifteenth amendment includes no purpose requirement seems necessarily to put them in conflict
(Footnote continued on next page)

Pending a definitive ruling by the Court on this question, we consider ourselves bound by this apparent view of a majority of the Mobile Court. Accord, Lodge v. Buxton, 639 F.2d at 1364 & n.11. On this basis, even had discriminatory effect been established here, we would nevertheless have been forced to hold as we do that the claim fails for lack of proof of discriminatory purpose.

IV

The plaintiffs also press on appeal their claims that the at-large election system violates their first and thirteenth amendment rights. We hold that to the extent

(Footnote continued from preceding page) with the plurality on this aspect of the congruent statutory claim. Of the remaining three Justices who did not address the statutory claim, the best estimate would appear to be that at least Justice White agreed that the statute also required proof of purpose. If it did not, this would have provided a further basis, and an even stronger one, for his disagreement with the result.

either of these amendments protects the voting rights here asserted - a question we do not decide - their protections do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments.

While Congress may arguably have some discretion in determining what kind of protective legislation to enact pursuant to the thirteenth amendment, it appears that the amendment's independent scope is limited to the eradication of the incidents or badges of slavery and does not reach other acts of discrimination. See The Civil Rights Cases, 109 U.S. 3, 23-25 (1883). In the realm of voting, we think the thirteenth amendment offers no protections not already provided under the fourteenth or fifteenth amendments.

In support of their first amendment claim, plaintiffs argue that "electoral victory is at the very core of the [democratic] process, and that "[g]iven the Court's

steadfast protection of more incidental political rights under the First Amendment, it would surely be strange if the right to win elected office were not equally protected from undue infringement." We reject this proposition in the form put. The first amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate do not also include entitlement to success in those endeavors. The carefully guarded right to expression does not carry with it any right to be listened to, believed or supported in one's views. Where, as here, the only challenged governmental act is the continued use of an at-large election system, and where there is no device in use that directly inhibits participation in the political process, the first amendment, like the thirteenth, offers no protection of voting rights beyond that afforded by the

fourteenth or fifteenth amendments.

V

One final issue requires attention. Plaintiffs sought at the outset to have this action certified as a class action under Fed. R. Civ. P. 23(a) and (b)(2), with a plaintiff class made up of all black citizens of the city of Columbia. In a pre-trial order the district court denied class certification on the basis that certification would serve no practical benefit to black citizens, for all would be equally affected by any action of the court. Subsequently, however, in conjunction with entry of its final judgment dismissing the action on the merits, the district court reversed its earlier order and certified the action as a class action with a plaintiff class composed of all black citizen residents of Columbia.

Plaintiffs challenge this ruling and contend that, regardless of the disposition

of the appeal in other respects, this belated class certification must be set aside. We agree. The effect of this ruling, if allowed to stand, would be to make the final judgment on the merits binding upon members of the belatedly certified class as well as the individual plaintiffs, Restatement (Second) of Judgments, § 85(1)(e), (2)(1980), though the former had not been parties to, nor persons otherwise subject to being bound by, the action at any time prior to entry of the adverse judgment. Id. Aside from the serious constitutional due process questions thereby raised, see Hansberry v. Lee, 311 U.S. 32 (1940), this ruling cannot stand as an appropriate exercise of trial court discretion. It constitutes at least an abuse of discretion in application of the class action rules and must on that basis alone be reversed.

Whatever the power of courts to certify class actions after judgment on

the merits favoring a class, compare Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975)(impermissible), with, e.g., Alexander v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 565 F.2d 1364 (6th Cir. 1977)(permissible), there can be no comparable power to certify a class action only after, or contemporaneously with, judgment on the merits against a class - at least where, as here, there has been no notice to the putative class members with consequent opportunity to be heard on the certification question, and possibly not even under those circumstances.

The bald power conferred in Fed. R. Civ. P. 23(c)(1) to alter or amend an earlier certification ruling "before the decision on the merits" (emphasis added) obviously cannot be drawn upon as a source of power for this ruling. The district court's announced perception when it denied certification before trial that "no practical

benefit would be served by certifying a class, since all citizens of Columbia would be affected equally by any action of the court" was in accord with circuit precedent, see Sandford v. R.L. Coleman Realty Co., 573 F.2d 173 (4th Cir. 1978), but it simply recognizes that so far as the interests of the putative class members in this type 23(b)(2) class action seeking only injunctive relief are concerned, non-certification as a class action is likely to be of no practical consequence. If judgment on the merits goes for the individual plaintiffs, the members of the putative class will be fully benefitted by it in practical, if not technically legal, terms; if judgment goes against the individual plaintiffs, the members of the putative class will not be legally bound by it. Obviously, however, the same irrelevance of consequences does not attend a subsequent determination to certify the class and thus bind it to an

unfavorable judgment.

However fictive may be the assumption that class members, either actual or putative, actually rely upon judicial rulings that actions potentially affecting their interests may proceed or may not proceed as class actions, it is a necessary assumption - recognized in various ways - in the administration of the class action device. See, e.g., Susman v. Lincoln American Corp., 587 F.2d 866, 869 (7th Cir. 1978), cert. denied, 445 U.S. 942 (1980). Here the putative class members were entitled to rely upon the district court's pre-trial ruling that the action would not proceed as a class action. They are entitled to protection against detrimental reliance on that ruling. This requires setting aside the order certifying the action as a class action.

VI

The judgment dismissing the individual claims on the merits is affirmed. The order

certifying the action as a class action is reversed.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Frank Washington, et al., Plaintiffs,	)	Civil Action No. 77-1791
vs	)	FINDINGS OF FACT
Kirkman Finlay, Jr., et al.,	)	CONCLUSIONS OF LAW AND
Defendants.	)	O R D E R

This action is brought by certain adult black citizens of the City of Columbia against the Mayor and members of the Columbia City Council and the members of the Columbia Municipal Election Commission alleging that the present method of electing City Councilmen unconstitutionally dilutes the voting power of the plaintiffs and all black citizens of the City of Columbia. Plaintiffs assert that the use of at-large voting, staggered terms of office, majority vote requirement for

election, limitation of number of Councilmen to four were all designed with the purpose and have had the effect of diluting the voting strength of blacks in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

Plaintiffs seek an injunction to prevent the defendants from holding further elections under the present apportionment of the City Council; a declaration that the present districting of the city is violative of their constitutional rights; an Order requiring City Council to reapportion itself to comply with the one person-one vote requirement; to increase the number of City Councilmen; to submit the reapportionment plan to the Attorney General of the United States pursuant to 42 U.S.C. §1973c; and require all members of City Council to be elected at the next general election held in the City of Columbia.

Trial of this cause was held on December 17, 18 and 19, 1979 and February 5, 1980. On those dates the Court heard 21 witnesses and received and reviewed over 100 exhibits; many of which contained hundreds of pages each.

After weighing the evidence and studying the applicable law, the Court, pursuant to Rule 52 F.R.C.P., makes the following

FINDINGS OF FACT

1. That plaintiffs Frank Washington, Charles Bolden, Alvin Hinkle, Gloria Jmaes, Rosa Bell Jones, Walter Storrs are all adult black citizens and residents of Columbia, South Carolina and are duly registered voters in the City. The plaintiffs bring this action on their own behalf and on behalf of all black citizens of Columbia pursuant to Rule 23(a) and Rule 23(b)(2) because of the common questions of law and fact and the members of the class

are so numerous as to make it impractical to bring all of the class before the Court. The Court finds that the interests of the class are adequately represented by the named plaintiffs.

2. The defendant Kirkman Finlay, Jr. is now the Mayor of the City of Columbia and is substituted for the original defendant John T. Campbell, who was Mayor at the time the action was commenced. The original members of City Council named as defendants were William Ouzts, R.E.L. Freeman, Kirkman Finlay and Patton Adams. Councilmen Paul Bennett and Rudolph C. Barnes, Jr. have replaced former Councilmen Freeman and Finlay on the City Council and as defendants in this action.

3. Joe Edens, I.P. Stanback and Ben Boyd are members of the Municipal Election Commission for the City of Columbia.

4. The Mayor and City Council constitute the legislative and governing body of

the City of Columbia. The City, pursuant to the Home Rule Act (Act No. 283 of the 1975 General Assembly of South Carolina), adopted the Council-Manager form of government. This adoption of the Council-Manager form of government did not represent a change in the City's government, since it had on June 1, 1950, adopted the commission form with a City Manager under a special election.

5. The present plan of four councilmen and a Mayor, all elected at-large, has been in existence since 1910. Prior to 1910 the City had been governed by a council made up of a Mayor or Intendent and as many as 16 aldermen elected from five city wards. Numerous clippings from the local newspaper for the year 1910 show that the change from alderman elected from wards to councilmen elected at-large was adopted by an overwhelming vote and resulted from abuses of the ward system.

6. Following the formal adoption of the Council-Manager form of government under the Home Rule Act the matter was submitted by the city attorney to the Civil Rights Division of the Justice Department pursuant to §5 of the Voting Rights Act of 1965 and received a reply that this adoption of the Council-Manager form did not effect a "change" within the meaning of §5 and the Attorney General took no action in connection therewith.

7. Prior to the adoption of the Home Rule Act, nominations for the office of Mayor and councilmen were made through political parties by use of a primary, convention or petition. In September 1975 the Columbia City Council adopted an ordinance (75-32) providing for a non-partisan election. These non-partisan elections were provided for in the Home Rule Act. The Home Rule Act was later amended (Act No. 81 of the 1977 General Assembly of South Carolina) to

provide for election by plurality vote, rather than a majority vote in a run-off in non-partisan elections.

8. Thereafter City Council adopted an ordinance (77-31) amending the non-partisan election procedure to provide for a plurality vote in the run-off. (1979 City Code 1-2071 et seq. Both the original adoption of non-partisan elections and the change from the majority run-off requirement to the plurality were approved by the Attorney General of the United States under the 1965 Voting Rights Act in letters dated January 26, 1976 and November 11, 1977, respectively.

9. Under this plan a candidate does not have to be nominated by a political party or a group signing a petition. The election process is open to any registered elector, who is a resident of the City, upon payment of a nominal filing fee. Although a candidate may advise voters of his political party affiliation there is no

indication of party contained on the ballot. If a candidate receives a majority of the votes in the election he is elected. When no one receives a majority, a run-off is required between or among one more than the number of candidates necessary to fill the offices. The candidates receiving the highest number of votes in the run-off election equal to the number of offices to be filled are declared elected.

10. After the present suit was brought, the City Council adopted a resolution on October 17, 1979 (Resolution R-79-17) setting a special election for December 18, 1979 to allow the residents of Columbia to vote on a change in the council membership, which would increase the number of council members to six, with three elected at-large and three from single member districts and the Mayor elected at-large. The voters turned down this plan, which did not have strong support among

the black or the white leadership of the city. The plaintiffs testified that the plan called the "three-three-one plan" would provide the blacks with one "safe" seat on City Council, but this was not acceptable to them.

11. The latest census figures (1970) show Columbia with a population of 113,542 of which 78,677 are white and 39,998 are black. In 1978, the date of the last city election, there were 11,464 black registered voters and 22,296 white registered voters. The number of white registered voters has been declining in recent elections while the number of black registered voters has been increasing. In the 1978 primary election for City Council 36.8% of the blacks voted and 41.5% of the whites voted.

12. No black, within living memory, has been elected to City Council although blacks have been running regularly for

the past 10 to 12 years.

13. As in most all cities in the southeastern part of the United States, there is a long history of racial discrimination, both de facto and de jure. This discrimination applied to all areas of life. Blacks were excluded from voting by various means, including poll taxes, use of literacy tests and membership restrictions imposed by the predominate [sic] Democratic Party until the Federal Court Order in 1948.

14. Schools were racially segregated from the first grade through college. Public accommodations and public transportation within the city were operated on a racially segregated basis, as was the city jail.

15. In the areas of income, education, housing and employment blacks in the City of Columbia, on the average, exist at a lower socio-economic level, and there are many residential areas in the city which are racially identifiable.

16. The city government has been responsive to the needs of the black community. Forty-three percent of the city employees are black although blacks represent only 23% of the work force in the area. In recent years blacks have been appointed to almost all city boards and commissions. There are two black city judges and two black city clerks. There are no black department heads, but there are black supervisors and division heads in various departments.

17. City budgets in recent years show substantial increases in expenditures and services of black residential areas and over 90% of the Community Development Block Grant Funds are spent to benefit low to moderate income families, including many blacks. Meetings have been held by city officials in black neighborhoods, at churches and schools to explain the use of community development funds and to receive comments

for future use of these funds.

18. The city has employed a Community Development Director. A great deal of his time is spent in working with HUD in an effort to provide more housing and rental units for low income groups, obtain HUD Section 8 funds to supplement rents, and revitalize run-down neighborhoods. Efforts to construct new public housing in the city have been hampered not by City Council but by the economy, cost of land, cost of construction and availability of funds. The Columbia City Housing Authority is not subject to control by the City Council and has jurisdiction not only in the City of Columbia but throughout Richland County. Some public housing is built outside the city limits because of the availability of lower cost land and not in an effort to remove blacks or other low income citizens from the city itself.

19. The plaintiffs contend that the failure of the city to annex an area known as "Greenview" was racially motivated, since most the residents of this area are black. However, the record shows that there were serious legal questions as to the sufficiency of the annexation petition due to certain petition names being forged. Also, the annexation of this area would impose very serious financial obligations upon the city to provide the necessary city services to the residents, and very little tax revenue would be realized when compared with necessary city expenditures for the area.

20. South Carolina no longer has an anti-single shot voting law. The original law, §23-357 of the South Carolina Code of Laws 1962, survived a constitutional attack brought by the Republicans in Boineau v. Thornton, 235 F.Supp. 175 (D.S.C. 1964) aff'd 379 U.S. 15 (1964), but fell when challenged by a black in Stevenson

v. West, Civ. Action 72-45 (D.S.C. unreported case April 7, 1972).

21. South Carolina no longer has a poll tax, literacy test or any other restriction on voting that is or could be applied in a discriminatory manner against blacks or any other segment of the population. Both major political parties are open to blacks and actively solicit their membership and support. Certain black leaders have formed their own political parties. There has been no effort to restrict registration of black voters and registration officials visit various parts of the cities and counties in order to facilitate registration and no longer are all voters required to come to the courthouse or office at the Registration Board to register.

22. The election process for City Council in Columbia is the most open and accessible that can be imagined. Any

registered voter can run for office. The filing fee is small, and when the filing fee represents a barrier to a candidate it has been waived upon filing of an appropriate affidavit of inability to pay. There is no primary, no requirement for party affiliation and no problem of getting the candidate's name on the ballot. Changing of the city elections to a non-partisan contest has actually made it easier for blacks to participate, since they do not have to incur the expense of a primary or run the risk of not being nominated in a primary.

23. Race was not a consideration in the change from the alderman elected from city wards to the at-large voting for city councilmen. This change was made in 1910 when few, if any, blacks were voting in city elections. The change was not made to discourage greater participation by blacks and the change obviously had the approval of the vast majority of the citizens since

it passed by a vote of 1310 to 68.

24. There is no evidence that the at-large system has been maintained or operated, at any time since its adoption, to promote racially discriminatory purposes, and the election ordinance has been changed to do away with the majority run-off requirement.

25. The plaintiffs contended in the first two days of trial that it was impossible for a black to be elected to City Council. On December 18, 1979, the second day of this trial, an election was held in Richland County of which Columbia is the county seat. The purposes of the election were to fill two vacancies on the Richland County Council and for citizens of the city to vote upon three-three-one plan mentioned in Finding of Fact No. 10. In this election a black candidate for County Council was elected and polled a majority of the votes cast in the city boxes. Also blacks voted

heavily against the three-three-one plan.

26. Voting in the city is racially identifiable to a certain extent due to the racial makeup of certain neighborhoods and voting precincts, but voting is not pollarized [sic]. Black candidates seek and receive support of voters in predominantly white areas and white candidates do the same in black neighborhoods. In recent elections blacks have received a larger percent of votes from whites than white candidates have received from blacks. Studies of recent elections in the city show that blacks used the single-shot method of voting much more than whites in the 1978 run-off election. With the three candidates running for two offices the number of votes cast per voter in the predominantly black wards was 1.14 as compared to the average number per voter cast in white areas of 1.9. This meant that almost all whites voted for at least

two of the three candidates, but a majority of the blacks voted for only one candidate in an effort to benefit the one black candidate by single-shot voting.

27. The statistical studies of recent elections show that although the percentage of registered black voters is 33.9 to a 66.1 percent white, it will only take a small increase in the number of blacks voting in an election to insure the election of a black candidate. With a white turnout of 25% a black turnout of 29.9% is necessary, and with a white turnout of 30% the blacks must turnout 35.9% to insure victory.

28. Although a black candidate has not yet been elected to City Council, the evidence shows that only a small additional turnout by black voters is necessary to accomplish such election. In the last election white voters gave the black candidate a much higher percent of support.

In the 1978 city election black candidates received approximately 25% of the vote in predominantly white areas and white candidates only 7% of the vote in predominately [sic] black areas.

29. Prior to the present legal action no effort had been made to increase the number of City Councilmen to more than four. This could have been called to a vote by filing a petition seeking a change in the makeup of the Council. After the passage of the Home Rule Act the majority of Council could adopt a plan and call a special election to change the number and method of electing Councilmen. (Section 5-15-30 South Carolina Code 1976). Such action was taken by City Council in adopting the three-three-one plan and submitting it to the voters on December 18, 1979 at which time it was rejected. This certainly indicates an effort by the present City Council to change the Council makeup and

method of election in the hope of electing black members.

30. There is no evidence that the at-large system has been maintained or operated for racially discriminatory purposes and there is no evidence that black candidates cannot be elected under the present system. The election of black County Councilmen, who carried the city boxes, on December 18, 1979 certainly indicates what can be done.

31. The present at-large system of electing members of City Council does not have the purpose nor the effect of diluting the voting strength of black citizens in Columbia.

CONCLUSIONS OF LAW

1. The Court has jurisdiction pursuant to 28 U.S.C. 1331(a), 1331(3) and (4) and 2201 and also pursuant to Rule 23 of the Federal Rules of Civil Procedure.

2. The Court finds that the necessary

requirements of Rule 23 have been met for the maintenance of the class action since the class is so numerous the joinder of all members is impractical, there are questions of law and fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class and the representative parties will fairly and adequately protect the interest of the class. The class is composed of all black citizens who are residents of the City of Columbia, South Carolina.

3. This action is also brought for declaratory and injunctive relief alleging deprivation under color of state law, statute, ordinance, regulation, custom or usage of certain rights and privileges secured to the plaintiffs by the Constitution and laws of the United States and such suit is authorized by 42 U.S.C. §1983. The plaintiffs claim constitutional

deprivations of rights secured under the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. Originally claims were made under the Voting Rights Act of 1965, 42 U.S.C. §1971, et seq., but by amended complaint these claims have been deleted.

4. Since the plaintiffs have made a constitutional attack upon the number of members of City Council and the method of election, the plaintiffs have the burden to produce evidence to support findings that the political processes leading to nomination and election are not equally open to participation by blacks and that the members of the class have less opportunity than do other residents in the city to participate in the political processes and to elect representatives of their choice. White v. Regester, 402 U.S. 755 (1973). White also holds that it is not enough that the plaintiff show that a racial

group allegedly discriminated against has not had legislative seats in proportion to its voting potential. There must be proof that the election process is not equally open to participation by the group and its members are denied participation in the political process. Such has not been proved in the present case.

5. In Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) the Court observed.

> As a matter of pure semantics it can be argued that a minority is denied equality of access to the political process if it does not have representation in proportion to its voting strength. With anything less its strength is minimized, cancelled out, or "diluted". The Supreme Court and this Circuit have consistently eschewed such a mechanistic approach. "Clearly it is not enough to prove mere disparity between the number of minority residents and the number of minority representatives."

The Supreme Court in White v. Regester, supra identified several factors indicative of denial of access to political process. Among these are: a history of official

racial discrimination which touched the right of the minority to register and vote and to participate in the democratic process; an historical pattern of a disproportionately low number of group members being elected to the legislative body; a lack of responsiveness on the part of elected officials to the needs of a minority community; a depressed socio-economic status which makes participation and community processes difficult and rules requiring majority vote as a prerequisite to nomination. Other indicia have been added by the Fifth Circuit in Zimmer, supra., and Kirksey v. Board of Supervisors of Hinds County, Miss., 454 F.2d 139 (5th Cir. 1977). These include poll taxes, literacy tests, property ownership requirements for running for office, disproportionate education, employment, income levels and living conditions, block voting, segregation principles adopted by the political

parties, requirement for majority vote to be elected, prohibition against single-shot voting, systematic exclusion from juries and levy of taxes to maintain dual school systems.

Since some of these conditions i.e. difference in socio-economic level between blacks and whites, still exist in many areas of the United States and most of the others existed at one time in the south-eastern part of the United States, it is necessary to look at the aggregation of those conditions now existing and whether they have the continuing effect of denying a minority group's ability to participate in the political processes.

As shown by the findings of fact, elections for City Council in Columbia no longer involve primaries or party nominations with any requirement of majority run-off. There is no longer a full slate law and the evidence shows that blacks have been effective in understanding

and using the single-shot vote. Elections no longer require a majority but a plurality is sufficient in the run-off. There is no longer a poll tax nor a type of property ownership requirement for either candidate or voter. There is no political party or politcal [sic] machine control over place on the ballot and anyone may become a candidate by merely filing his name and paying a nominal filing fee. There are no restrictions on the registration of voters and efforts are made by all political parties and by the Registration Commission to enroll as many voters as possible and make the enrollment as convenient and easy as the law allows.

There is no difference in the number of voters registered in a federal election when compared to those registered in state or local elections. There has been no effort by anyone to prevent blacks from registering, running as candidates or

voting for the candidates of their particular choice. There is no significant difference in the percent of the black population registered to vote when compared to the percent of the white population registered to vote.

The testimony shows unequivocally that the elected officials in Columbia have employed a disproportionately large number of blacks as city employees when compared to the number of blacks in the population and blacks have been assigned to responsible positions and have been appointed to most of the city boards and commissions. The City Council is responsive to the needs of the black community and large sums of money are being spent annually in delivering services to the black neighborhoods and improving conditions there. Also, large amounts have been spent in planning for the future needs of the city with particular emphasis on black areas.

It is well established that minority groups can be effectively represented by members of other races. Vollin v. Kimbel, 519 F.2d 790 (5th Cir. 1975). The Supreme Court has consistently rejected the proposition that members of minority groups have a federal or constitutional right to representation in legislative bodies in proportion to their numbers in the general population. Beer v. U.S., 425 U.S. 130 (1976).

The plaintiffs have totally failed to prove any racially discrimination intent or purpose on the part of the defendants in maintaining a City Council with four councilmen elected at large with little basic change for the last 70 years. Proof of racial discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment or the provisions of the Fifteenth Amendment. See Village of Arlington

Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) and Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978). There is no proof of such an intent in this record.

Although most courts, when required to reapportion a district, prefer single member districts, it does not follow that multi-member districts are per se unconstitutional. Whitcomb v. Chavis, 403 U.S. 127 (1971).

The language of the Fifth Circuit in Bradas v. Rapidis Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975) is particularly helpful. In this case the Circuit Court set aside a reapportionment plan adopted by the District Court and in doing so stated:

> Following the mandate of the Supreme Court in White v. Regester, 412 U.S. 755 (1973) we have consistently recognized that "access to the political process and not population (is) the barometer of dilution of minority voting strength."

Reese, supra. 505 F.2d at 822; Turner, supra. 530 F.2d at 193-94; Zimmer, supra, 485 F.2d at 1303. Plaintiff's burden, then, "is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. It is the failure to meet this burden that we find appellee's proof fatally deficient.

In Turner we set forth a number of factors drawn from White and Zimmer relevant to a determination of whether a minority group actually lacks meaningful access to judicial process.

"Among the factors entitled to consideration are the continuing effects of past discrimination on the minority group's ability to participate in the candidates' election process, the responsiveness of elected officials to the particular concerns of the minority group, and the strength of the state interest in multi-member or at-large voting.

Furthermore, both White v. Regester and Zimmer recognize that the presence of various structural voting devices such as a majority vote requirement, anti-single shot voting, large

districts and lack of residency requirements in a district or its geographical subdivisions may increase the potential for dilution under multi-member or at-large arrangement. Dilution, as with so many complex factual determinarions turns on an aggregation of the circumstances. (Footnotes deleted) Turner, supra. 490 F.2d at 194.

Consideration of the evidence below in the light of these factors emphasizes the dearth of appellees' proof. Neither the record nor the district court's findings indicates difficulty on behalf of blacks in registering to vote, in choosing the political party they desire to support, in meaningfully participating in party activities, in qualifying as candidates for a desired office, in participating in the candidate selection process, or in participating meaningfully in any other portion of the political process. The record does not evidence a state policy favoring nulti-member districts that is rooted in racial discrimination, nor does it indicate a lack of responsiveness on behalf of elected officials to the particular concerns of the black community. The single glaring fact that no black has ever been elected to a parish office does not by itself suport [sic] judicial nullification of a reapportionment plan. It evidences no more at the most than a policy of past discrimination. But the

> issue here of course is not whether Rapides Parish discriminated against blacks in the past, but rather whether any debilitating effects of that discrimination still persist. In previous cases such debilitating effects have usually been shown by a relatively large discrepancy between the size of the black population and the number of registered black voters or between the number of blacks registered to vote in federal elections and the number of blacks registered to vote in state elections. A finding of continued effects of past discrimination is not supported by any evidence in this record.
>
> Likewise it does not suffice to show that the use of multi-member districts has diminished to some extent the proportion of blacks in the voting unit unless some evidence also demonstrates that such multi-member districts were 'conceived or operated as purposeful discrimination."
> Whitcomb v. Chavis.

If anything, the present case demonstrates no more than the Brades case and the fact that a black has never been elected to City Council by itself does not justify declaring the present composition of City Council and its method of election

unconstitutional. The acts of past discrimination and past efforts to prevent black participation in the elective process have been swept away. The Columbia City Council elective process is the most open and accessible that can be imagined.

While there are ways the Court might suggest to improve the chances of blacks being elected to City Council, this is not the function of the Court. The judicial role is to examine the situation and see if it measures up to the requirements of the United States Constitution. Since there has been no showing of denial of due process or equal protection, and no showing of dilution of black voting strength or denial of access to the ballot and participation in the nominating and election process, and it is obvious that black residents of Columbia have full and equal access to the political processes, the present plan passes constitutional

muster. The at-large system of election was not racially motivated at the time of its inception and has not been maintained for invidiously discriminatory purposes. The system has not had the purpose or effect of depriving any person or group of people from full access to the political process. This at-large plan of election has neither cancelled, diluted nor minimized the voting strength of the plaintiffs or the class they represent. Since the present system is not unconstitutional the present action must be dismissed and the Clerk of Court is directed to enter judgment in favor of the defendants.

AND IT IS SO ORDERED.

s/Robert F. Chapman
ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

March 23, 1980
Columbia, South Carolina

Opposition

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1969

IN THE

Supreme Court of the United States

October Term, 1981

FRANK WASHINGTON, ALVIN HINKLE, GLORIA JAMES, ROSA BELL JONES, AND WALTER STORRS, PETITIONERS,

versus

KIRKMAN FINLAY, JR., INDIVIDUALLY AND AS MAYOR OF THE CITY OF COLUMBIA, SOUTH CAROLINA; WILLIAM C. OUZTS, PAUL Z. BENNETT, RUDOLPH C. BARNES, JR., AND T. PATTON ADAMS, INDIVIDUALLY AND AS MEMBERS OF THE CITY COUNCIL OF COLUMBIA, SOUTH CAROLINA; MRS. JOHN T. (MARCIA) DUFFY, INDIVIDUALLY AND AS CHAIRMAN OF THE MUNICIPAL ELECTION COMMISSION OF THE CITY OF COLUMBIA, SOUTH CAROLINA; AND WILHELMINA J. HALLMAN AND JOHN C. B. SMITH, JR., INDIVIDUALLY AND AS MEMBERS OF THE MUNICIPAL ELECTION COMMISSION OF THE CITY OF COLUMBIA, SOUTH CAROLINA, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U. S. C. 1973c:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title

are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced, without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

28 CFR 51.1 provides, in pertinent part:

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by section 4(a) of the Act, 42 U.S.C. 1973b, of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until the authority proposing enforcement either (1) obtains from the U.S. District Court for the District of Columbia a declaratory judgment that the plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or (2) the plan has been submitted to the Attorney General and he has interposed no objection within a 60-day period following submission. . . .

28 CFR 51.3 provides, in pertinent part:

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) The 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements of § 51.10(a). Procedures for requesting additional material and for determining the commencement of the 60-day period when a submission is inadequate are described in § 51.18.

28 CFR 51.4 provides, in pertinent part:

Section 5 requires that, prior to enforcement of any change affecting voting, the State or political subdivision which has enacted or seeks to administer the change affecting voting must obtain either a judicial or an executive determination that denial or abridgement of the right to vote on account of race or color is not the purpose and will not be the effect of the change. It is illegal to enforce a change affecting voting without complying with section 5. The obliga-

tion to obtain such judicial or executive review is not relieved by illegal enforcement.

28 CFR 51.18 provides, in pertinent part:

> (a) If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice.
>
> . . .

Ordinance 82-9, City of Columbia, provides, in pertinent part:

> BE IT ORDAINED by the City Council of the City of Columbia, South Carolina, this 24th day of February, 1982, that the 1979 Code of Ordinances of the City of Columbia is amended as follows:

Section 1. Code Section 1-1001 is amended to read as follows:

> The City of Columbia shall be governed by the Council-Manager form of municipal government as prescribed by Act No. 283 of 1975 with a Mayor and two (2) Council members elected at large and four (4) Council members elected from single member districts as provided in Code Section 1-2072.

Section 2. Code Section 1-2072 is amended to read as follows:

> The Mayor and two (2) Council members shall be elected at large and four (4) Council members shall be elected one (1) from each of four (4) separate districts; beginning with the 1982 City Council elections, two Council members and the Mayor elected at large, the Mayor and one Council member elected to a two-year term, with the Council candidate receiving the highest vote total serving the four-year term; also in the 1982 elections, two Council members elected from single member districts, those districts to be deter-

mined by City Council, one Council member for a two-year term and one for a four-year term as determined by Council; in the 1984 election, Council members shall be elected from the remaining two districts, one council member elected for a two-year term and one Council member elected for a four-year term as determined by Council, so that every two years hereafter, one Council member at large and two from single member districts will be elected for four-year terms

Boundaries for the four (4) single-member districts shall be as set forth on the following map and description:

Section 3.

In the 1982 City Council election two (2) Council members and the Mayor shall be elected at large, the Mayor and one (1) Council member elected for four (4) years and one (1) Council member elected to a two (2) year term with the Council candidate receiving the highest vote total serving the four (4) year term. Also in the 1982 election one (1) Council member shall be elected from District 1 for a four (4) year term and one (1) Council member shall be elected from District 2 for a two (2) year term.

Section 4. This Ordinance shall be effective for 1982 City elections.

The Resolution of October 14, 1981, setting Special Election provides:

BE IT RESOLVED this 14th day of October, 1981, by the Mayor and City Council of The City of Columbia that pursuant to Section 5-15-30 of the Code of Laws of South Carolina, 1976, a special election be held between the hours of 8 o'clock A. M. and 7 o'clock P. M. on Tuesday, December 15, 1981, for the purpose of presenting the following specific question to the electors of the City of Columbia:

Shall the City of Columbia, South Carolina, change the number of and method of election of members of

City Council from a Mayor and four Council members, elected at large, to a Mayor and two Council members, elected at large, and four Council members elected one from each of four separate districts; beginning with the 1982 City Council elections, two Council members and the Mayor elected at large, the Mayor and one Council member elected for four-year terms and one Council member elected to a two-year term, with the Council candidate receiving the highest vote total serving the four-year term; also in the 1982 elections, two Council members elected from single-member districts, those districts to be determined by City Council, one Council member for a two-year term and one for a four-year term as determined by Council; in the 1984 election, Council members shall be elected from the remaining two districts, one council member elected for a two-year term and one Council member elected for a four-year term as determined by Council, so that every two years, hereafter, one Council member at large and two from single member districts will be elected for four-year terms.

YES NO

In the event the question receives a majority of YES votes, the changes shall become effective in accordance with an ordinance to be adopted pursuant to Section 51520 of the 1976 Code of Laws of South Carolina.

ADDITIONAL STATEMENT OF THE CASE

By a special election held on December 15, 1981, a majority of voters in the City voted in favor of a method of election providing for a Mayor and two City Council members elected at-large and four Council members elected one from each of four separate districts. The Resolution of City Council on October 14, 1981, which had set the special election, provided that if a majority of voters voted in favor of the referendum question, the changes would become effective in accordance with an ordinance to be adopted.

Ordinance 82-9, passed by City Council on February 24, 1982, provided for amendments to the City Code to allow government by a Mayor and two Council members elected at large and four Council members elected from single-member districts described in the Ordinance. By its express terms, in Section 4, the Ordinance was to be effective for the 1982 City elections. No 1982 City elections have yet been held.

On March 9, 1982, the Attorney General received the City's submission concerning the referendum and Ordinance 82-9. The submission was made pursuant to Section 5 of the Voting Rights Act of 1965.

On May 10, 1982, the City was advised by the Attorney General that further information concerning the submission would be requested from the City and that the 60-day period in which the Attorney General can interpose an objection to a submitted change would not commence until such information was received. A copy of the letter from the Attorney General dated May 10, 1982, and received May 12, 1982, is reproduced in the Appendix.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari is solely based on petitioners' argument that this case has become moot. However, this case has not been mooted and the election system challenged by petitioners in this case remains in effect. Petitioners' mootness argument is erroneous.

As shown by his letter set out in the Appendix, the Attorney General has not yet determined whether he will interpose objections, under Section 5 of the Voting Rights Act, to the section of Ordinance 82-9 which sets the boundaries of the single-member districts. Obviously, the section of the Ordinance setting the boundaries is an integral and necessary part of the Ordinance which changes the election system. It is a matter of prophecy as to whether or when the

entire Ordinance will be cleared by the Attorney General.

Enforcement of the Ordinance, in the absence of the Attorney General's clearance, is prohibited by 42 U. S. C. 1973c and by 28 CFR 51.1 and 51.4. Accordingly, no elections can be held under the new election system prescribed by the Ordinance unless and until the Attorney General clears the entire Ordinance under Part 51 of 28 CFR. Since Ordinance 82-9 cannot be enforced or implemented, the City of Columbia's present form of government and the at-large election system remain in effect. Since it is the constitutionality and legality of Columbia's present at-large election system which is the subject of this case, it is clear that this case has not been mooted.

CONCLUSION

Petitioners, by this case, challenged the constitutionality of the City of Columbia's at-large system of electing City Council members. Although a new election system was approved by referendum after issuance of the opinion of the Fourth Circuit, the Ordinance establishing the new election system has not become effective and cannot be implemented or enforced unless and until the Attorney General clears the entire Ordinance pursuant to Section 5 of the Voting Rights Act. The Attorney General has not yet cleared the entire Ordinance. In the absence of clearance, the election system which is the subject of this case remains in effect. The issues involved in this case have not been mooted. The Petition for Writ of Certiorari, which relies on the mootness argument, should be denied.

Respectfully submitted,

ROY D. BATES,
Post Office Box 147,
Columbia, South Carolina 29217,
(803) 733-8247
Attorneys for Respondents.

Appendix

U. S. DEPARTMENT OF JUSTICE

WBR:CWG:DEK:gml
DJ 166-012-3
E5941-5942
E7776

May 10, 1982

Roy D. Bates, Esq.
City Attorney
City Hall
Post Office Box 147
Columbia, South Carolina 29217

Dear Mr. Bates:

This is in reference to the change in election method, the increase in the number of councilmembers and the creation of single-member districts for the City of Columbia in Richland County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. 1973c. Your submission was received on March 9, 1982.

With respect to the change in the method of election and increase in the number of councilmembers, the Attorney General does not interpose any objections. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

With respect to the boundary lines for the single-member districts, after a careful examination of the initial submission, we have determined that the information sent is insufficient to enable the Attorney General to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

To enable us to evaluate your submission properly, please provide the following information:

1. Census map of the city which clearly shows the district lines or a listing of the Census tracts, enumeration districts and number of blacks, as appropriate, contained within each proposed district.

2. Explanation of the extent to which the minority community participated in, or had input into, the drawing of the adopted 4E plan.

3. Election returns, by ward and by race, for the December 15, 1981, referendum election.

4. Copy of the SLED report on the Greenville annexation petition.

5. For the 4C, 4D and 4CB (Bannister) Plans, please provide reasons why each was rejected by the council.

6. For each of the above plans, the 4C, 4D, Bannister plans, please provide the total population and number of registered voters, by district and by race, for each proposed district.

7. Census Bureau reports a total population of 101,208, a black population of 40,703, and a white population of 58,472. Please indicate the basis for your population figures, including any appropriate documentation, since the figures which you have provided differ from those reported by Census.

8. Extent to which the population and registered voters at the University of South Carolina, Benedict College and Allen University were considered in District 2.

As you know the Attorney General has sixty days in which to consider a submission pursuant to Section 5. This sixty-day period will begin when this Department receives the information necessary for the proper evaluation of the change you have submitted. Further, you should be aware that if no response is received within sixty days of this request, the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.38). Therefore, please inform us within twenty days of your receipt of this letter

of the course of action the City of Columbia plans to take to comply with this requst.

In addition, it has come to our attention that several special elections have been held in the city without Section 5 preclearance. Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum is a change affecting voting and is subject to the preclearance requirements of Section 5. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.12(j)).

If you have any qustions concerning the matters discussed in this letter or if we can aid you in any way to obtain the additional information we have requested, please do not hesitate to call Ms. Doris Kelly (202-724-7336) of our staff, who has been assigned to handle this submission. Please refer to File No. E7776 in any written response to this letter so that your correspondence will be properly channeled.

Sincerely,

WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

By: /s/ GERALD W. JONES
Chief, Voting Section